STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: MR. AND MRS. GREGORY SWECKER, Complainants, vs. MIDLAND POWER COOPERATIVE, Respondent.	DOCKET NO. FCU-99-3 (C-99-76)

ORDER DENYING APPLICATION FOR REHEARING

(Issued October 6, 2000)

INTRODUCTION

This case involves a customer of a rural electric cooperative who installed a wind generator and disagrees with the terms and conditions of the cooperative's cogeneration tariff. The Utilities Board (Board) issued an order on August 25, 2000, affirming the proposed decision and order issued by the ALJ. The Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed an application for rehearing on September 14, 2000, asking the Board to reverse the ruling it made with respect to the application of Iowa Code §§ 476.41-.45 to electric cooperatives.

Pursuant to Iowa Code § 476.12 (1999), the Board must rule on the application by October 13, 2000, or it will be deemed denied by operation of law. The Board will deny the application for rehearing because it presents no new evidence, issues, or arguments for the Board to consider.

PROCEDURAL BACKGROUND

On August 25, 2000, the Board issued an order affirming the proposed decision and order issued in this docket by the Administrative Law Judge (ALJ) on March 28, 2000, as modified by the ALJ's order of May 18, 2000. As a result, the Board ordered that the cogeneration tariffs of Midland Power Cooperative (Midland) are unreasonably discriminatory with respect to customers using renewable energy sources. That discrimination is a violation of Iowa Code § 476.21. Accordingly, the Board ordered that the relevant sections of Midland's tariff are unlawful and that the Complainants, Mr. and Mrs. Gregory Swecker, should be permitted to interconnect their wind turbine with the Midland electric system under Midland's regular three-phase service tariff.

As a part of the August 25, 2000, order, the Board affirmed the ALJ's ruling that the Board's net billing rules do not apply to electric cooperatives and municipal utilities. Consumer Advocate has argued throughout this case that the net billing rule applies to all electric utilities in the case, and on September 14, 2000, Consumer Advocate filed an application for rehearing of this aspect of the Board's August 25, 2000, order.

The background of this issue is lengthy but necessary to an understanding of the jurisdictional question presented. When the Board (then the Commerce Commission) wrote its initial Alternate Energy Producer (AEP) rules in 1983, the Board included the net billing rule, providing an AEP with the right to interconnect with the serving utility through a single meter that ran forward when the AEP was consuming system energy and backwards when the AEP was a net generator. The Board relied on Iowa Code §§ 476.41-.45 for authority; those statutes require all electric utilities in Iowa to purchase AEP output pursuant to the Board's rules.

The initial AEP rules became the subject of at least two judicial review proceedings, one filed by the investor-owned utilities to challenge the AEP purchase rate and another filed by the electric cooperatives to challenge the Board's jurisdiction with respect to RECs and other electric utilities that are not subject to state rate regulation. The two judicial proceedings were consolidated in Polk County District Court as Nos. AA677 and AA790.

The RECs argued that the federal alternative energy statute, the Public Utility Regulatory Policy Act or PURPA, preempted the Iowa AEP statute with respect to RECs. PURPA, like the Iowa AEP statute, required that electric utilities interconnect with and purchase the output of certain generators, identified as Qualifying Facilities (QFs). Under PURPA, rate-regulated utilities were required to purchase from QFs at avoided cost, which was determined by the

state regulatory agency, but utilities that were not subject to state rate regulation were permitted to determine their own avoided cost purchase rates. The Iowa RECs argued that PURPA's scheme preempted the Iowa statute and prohibited the Board from setting the AEP purchase rate for RECs, which are not subject to rate regulation in Iowa.

The Polk County District Court agreed with the REC arguments and ruled that PURPA preempts state law with respect to the RECs. Iowa Power and Light Co. et al. v. Iowa State Commerce Comm'n, AA677 and AA790, Polk Cty. Dist. Ct. (1986) at page 74. Thus, the District Court held that Iowa Code §§ 476.41-.45 and the rules promulgated thereunder were unconstitutional to the extent they purported to establish AEP purchase rates for utilities that are not subject to state rate regulation.

This part of the District Court decision was appealed by the Board to the Iowa Supreme Court, which affirmed the District Court. Iowa Power and Light Co. v. Iowa State Commerce Comm'n, 410 N.W.2d 236 (Iowa 1987). The Supreme Court stated:

> The district court however correctly observed a congressional intent to distinguish, in regulating cogeneration and small power facilities, between state regulated electric utilities and nonregulated electric utilities.
>
> * * *
>
> We think Congress intended to preempt only that part of the field which was not already state-regulated.

Id. at 241.

Because of differences in the terminology used by the two courts and the manner in which they approached the issue, the precise extent of the Supreme Court's ruling is difficult to determine. The District Court's final holding is that the AEP statutes and the associated rules "are unconstitutional to the extent they attempt to establish rate regulation as regards otherwise unrate-regulated utilities." District Court order at page 74. This could be read to prohibit only Board regulation of the REC rates for purchases from AEPs. The Supreme Court, however, focussed on a broader statement in the District Court order, indicating that purchases from AEPs by non-rate-regulated utilities were subject to federal regulation and, therefore, more broadly removed from Iowa regulation. By relying upon this broader statement, the Supreme Court appears to have declared all of Iowa Code §§ 476.41-.45 to be unconstitutional and preempted with respect to utilities that are not subject to the Board's rate regulation.

The ALJ adopted this interpretation of the Iowa Power decision in the September 28, 1999, "Order Regarding Responses" and continued to apply this interpretation throughout this docket. Consumer Advocate challenged that interpretation by appealing it to the Board; it was identified as Issue No. 8 in the Board's review of the proposed decision and order. The Board affirmed the ALJ's interpretation on August 25, 2000, when it affirmed the proposed decision and order.

CONSUMER ADVOCATE'S APPLICATION FOR REHEARING

Consumer Advocate argues that the ALJ and the Board are applying an unnecessarily broad interpretation of the Supreme Court decision. Consumer Advocate relies on judicial precedent for the proposition that "[c]ourts will not interpret a federal statute in such a way as to intrude upon an area traditionally regulated by the states absent a clear expression of congressional intent to do so." Application For Rehearing at pages 3-4, citations omitted. Consumer Advocate also relies on one statement from the Iowa Power decision in which the Iowa Supreme Court opined: "We think congress intended to preempt only that part of the field which was not already state-regulated." 410 N.W.2d at 241. Consumer Advocate argues that this language recognizes that the state can still decide to regulate REC purchases from AEPs, so long as the state expresses that intent. Consumer Advocate points to Iowa Code § 476.1A as an expression of that intent by the Iowa legislature; that statute provides that RECs are not subject to the Board's rate regulatory authority but they are subject to the AEP statutes, Iowa Code §§ 476.41-.45.

RESPONSES OF OTHER PARTIES

On September 28, 2000, Midland Power Cooperative filed a resistance to Consumer Advocate's application for rehearing, while Central Iowa Power Cooperative and the Iowa Association of Electric Cooperatives filed a response and objection. Both filings make the same argument: Consumer Advocate's

application does not raise any new issue or argument. Instead, Consumer Advocate is effectively asking the Board to reverse its prior ruling on this issue, based on arguments the Board has already rejected.

ANALYSIS

The Board will deny Consumer Advocate's application for rehearing because it does not present any new issues or arguments for consideration and because it makes the Iowa Power decision a nullity. Consumer Advocate appears to be arguing that Iowa's AEP statute is only preempted to the extent that the Iowa legislature wants it to be preempted, because the legislature can pass a law at any time saying it intends to regulate any particular area, making it a "state-regulated" area that is no longer preempted. This outcome cannot be reconciled with the Iowa Power finding of preemption; with the AEP statute, the Iowa legislature clearly indicated its desire to regulate AEP purchases by RECs, but the Iowa Supreme Court found the AEP statute was preempted by PURPA. According to Consumer Advocate, Iowa's statute purporting to regulate these transactions made them "state-regulated" transactions, and therefore not preempted, but that is not what the Iowa Supreme Court held.

It is possible that the Iowa legislature could decide to make RECs subject to the full panoply of rate regulation, at which time PURPA would no longer preempt the application of the AEP statute to the RECs. However, until a statute is passed extending rate regulation to the RECs, PURPA provides that non-rate-

regulated utilities are not subject to state regulation of the RECs' transactions with QFs and AEPs.

IT IS THEREFORE ORDERED:

The application for rehearing filed by Consumer Advocate on September 14, 2000, is denied.

UTILITIES BOARD

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Judi K. Cooper
Executive Secretary, Deputy

/s/ Diane Munns

Dated at Des Moines, Iowa, this 6th day of October, 2000.